A

PP

v.

ZULKIPPLY TAIB & ORS AND OTHER CASES

B

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL APPEALS NO: 42S(A)-141-09-2011,
42S(A)-142-09-2011, 42S(A)-152-10-2011
& 42S(A)-45-04-2012]

C

21 APRIL 2014

CRIMINAL LAW: *Penal Code - Section 193 - Intentional giving of false evidence - Appeal against conviction and sentence - Police officer charged under s. 193 for causing fellow officer to give false evidence*

D

pertaining to injury suffered by detainee - Whether charge defective - Whether offence under s. 193 for causing some other person to give false statement - Whether appeal allowed

CRIMINAL LAW: *Penal Code - Section 330 - Voluntarily causing*

E

hurt to extort information - Appeal against conviction and sentence - Police officer voluntarily causing hurt to extort information which might lead to detection of criminal intimidation offence from detainee - Detainee injured and scalded with hot water - Victim had not identified accused during identification parade due to fear - Whether rank of accused showed

F

that accused could not have tried to extort confession and could not have committed offence - Whether discrepancies in evidence of prosecution witnesses - Whether prosecution witnesses were accomplices and their evidence lacked corroborative value - Whether conviction safe

CRIMINAL PROCEDURE: *Accomplice - Whether witness an*

G

accomplice - Police officer charged with voluntarily causing hurt to detainee to extort information - Whether police officers merely present in room where detainee abused became accomplices

CRIMINAL PROCEDURE: *Sentencing - Appeal against sentence -*

H

Police officer voluntarily causing hurt to detainee to extort information - Use of police powers arbitrarily to inflict violence and hurt - Aggravating factor - Whether four years imprisonment justified

I

The seven accused persons were charged with an offence under s. 330 of the Penal Code ('PC') for having voluntarily caused hurt to PW12 and PW14 with the intention of extorting a confession for the detection of an offence under s. 506 of the PC. The second accused faced an additional charge under s. 193 of the PC for having caused PW5 to state that no interrogation was carried out on PW12 and PW14 as well as not stating the truth that PW12 and PW14 were hurt or injured as a result of being scalded with hot water. At the close of the prosecution case, the learned Sessions Court Judge ('SCJ') had acquitted and discharged the third to seventh accused persons on the charges under s. 330 of the PC. The second accused was acquitted and discharged of the charge under s. 193 of the PC without his defence being called. At the close of the defence case, the first and second accused persons were found guilty and were convicted on the s. 330 charges and were sentenced to four years imprisonment in respect of each charge. The prosecution appealed against the order of acquittal and discharge of the third to seventh accused persons on the s. 330 charges. The prosecution also appealed against the acquittal of the second accused on the s. 193 charge on the ground that the SCJ erred when he found that there was no evidence to prove that PW5 had made a false statement in relation to the charge under s. 193. It was submitted that it was the second accused who had caused PW5 to make a false statement. Meanwhile, the first and second accused appealed against the conviction and sentence on the s. 330 charges, *inter alia*, on the following grounds that: (i) the complainant, PW12, had failed to identify the first accused at an identification parade ('ID parade') which was held nine days after the incident. Hence, it was submitted that the identification of the first accused at the hearing after more than two years had passed would make the identification very questionable. PW12 had claimed that he had not identified the first accused at the ID parade because he was in fear; (ii) since under s. 113 of the Criminal Procedure Code the first and second accused were not capable of extorting a confession from PW12 and PW14, they could not have committed the offence under s. 330; (iii) the judgment of the SCJ was not a speaking judgment; (iv) whilst the SCJ had acknowledged that there were some discrepancies between the evidence of the witnesses, the SCJ did not state what those discrepancies were that he found to be not material discrepancies; and (v) PW1, PW5, PW6 and PW9 were accomplices and as such their

A evidence was suspicious and lacked corroborative value. It was contended that the SCJ had only once mentioned corroboration and that is when he had held that it was not safe to call on the defence of the third, fourth, fifth and sixth accused persons. As such, it was submitted that there was no proper judicial
B appreciation of the evidence on this issue as the SCJ had blown 'hot and cold in the same breath' on the evidence that was adduced before him.

Held (dismissing appeals):

C

(1) PW12 had not identified the first appellant during the ID parade. However, the court could not arbitrarily dismiss the reasons given by PW12 as to why he had not identified the first accused. As to whether those reasons given were truthful, whether he was in fact in fear of the first accused who had
D allegedly caused him much pain so much so that he was afraid to identify him during the ID parade could also be weighed and considered from the weight of the evidence of the complainants. The testimonies clearly identified the first and second accused as persons who had beaten them with the
E rubber hose as well as having splashed them with hot water on multiple occasions. (paras 16 & 19)

(2) The key ingredient for an offence under s. 330 is causing hurt. The hurt may be caused for various purposes. There is no
F necessity that a confession should indeed have been successfully extorted nor is it material that the person who had caused the hurt was not a person who was legally capable of extorting a confession in the sense that such a confession, even if extorted, would not have been admissible in court.
G (para 29)

(3) The failure of a trial court to state in its grounds that a particular issue was considered does not lead automatically to the conclusion that it had not been considered or at all. Even
H if a judgment is in fact a non-speaking judgment, it would still be incumbent upon the court to carefully peruse and weigh the evidence that was adduced at the lower court to ascertain if the conclusions reached by the lower court were properly arrived at. (para 33)

I

(4) The presence of PW5 and PW9 in the room when the complainants had suffered hurt and abuse, without more, was insufficient to conclude that they were complicit in the abuse or that they were accomplices of the first and second accused. Whilst PW5 and PW9 should have at least attempted to stop something that was quite obviously wrong, the fact that they did not do so was a moral failing. The moral failing in not attempting to stop their superior officer was insufficient to taint them with the same brush as the appellants in terms of liability, responsibility and complicity for the commission for the offence, such as to render them as accomplices. (para 60)

(5) PW5, PW9, PW6 and PW1 were not accomplices of the appellants in the commission of the offence under s. 330 PC against PW12 and PW14. Their evidence in the main corroborated each other and the complainants in material particulars. They were credible witnesses notwithstanding their admitted attempt to mislead the Bukit Aman investigators about the interrogation of the complainants and the hurt that was caused to them. (para 62)

(6) The appellants being long-serving members of the rank of sergeants in the Police Diraja Malaysia who should have protected members of the public such as the complainants had instead used their powers arbitrarily not to uphold the law but to inflict violence and hurt on the very persons whom they were duty bound to protect. Such outrageous acts of the appellants in scalding arrested persons while they were cuffed and impotent to protect themselves would amount to an aggravating factor, for which the SCJ had rightly rejected a sentence of a binding over. The SCJ was not in error in the sentence imposed. (para 69)

(7) The charge against the second accused under s. 193 was that he had caused PW5 to state that no interrogation was carried out on PW12 and PW14 as well as not stating the truth that PW12 and PW14 were hurt or injured as a result of being scalded with hot water. A charge under s. 193 is one of intentionally giving false evidence. The charge as it stood was both bad and erroneous. The charge did not state that the second accused had intentionally given false evidence. There is no known offence under s. 193 for causing some other person to give a false statement. Hence, the appeal against the order of acquittal and discharge on s. 193 must fail. (para 98)

Case(s) referred to:
Chao Chong & Ors v. PP [1959] 1 LNS 11 HC ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38B; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Chew Chee Wah [1996] 1 CLJ 94 HC ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Karthiselvam Vengatan [2008] 1 LNS 32 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP lwn. Mohamad Tawakal [2012] 7 CLJ 372 CA ***(refd)***
PP v. Mohd Fuad Othman [2000] 1 LNS 190 HC ***(refd)***
PP v. Muhari Mohd Jani & Anor [1999] 8 CLJ 430 HC ***(refd)***
Raja Izzuddin Shah v. PP [1978] 1 LNS 165 HC ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Thong Ah Fat v Public Prosecutor [2011] SGCA 65 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 113, 294
Evidence Act 1950, s. 25
Penal Code, ss. 34, 193, 330, 506

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 25th edn, p 1693

(Criminal Appeal No: 42S(A)-141-09-2011)
For the appellant (PP) - Nurul Ashiqin Zulkifli; DPP
For the 1st & 3rd respondents - Hazman Ahmad; M/s Omar Ismail Hazman & Co
For the 2nd & 5th respondents - Adenan Ismail; M/s Adenan & Assocs
For the 4th respondents - Nik Mohamed Ikhwan; M/s Nik Ikhwan & Co

(Criminal Appeal No: 42S(A)-142-09-2011)
For the appellant (PP) - Nurul Ashiqin Zulkifli; DPP
For the respondent - Amer Hamzah Arshad; M/s Ranjit Singh & Yeoh

(Criminal Appeal No: 42S(A)-152-10-2011)
For the appellant - Adenan Ismail; M/s Adenan & Assocs
For the respondent (PP) - Nurul Ashiqin Zulkifli; DPP

(Criminal Appeal No: 42S(A)-45-04-2012)
For the appellant - Amer Hamzah Arshad; M/s Ranjit Singh & Yeoh
For the respondent (PP) - Nurul Ashiqin Zulkifli; DPP

[Appeal from Sessions Court, Kuala Lumpur; Case No: 61-1-2009]

Reported by Amutha Suppayah

JUDGMENT

Amelia Tee Abdullah J:

[1] Before the Sessions Court Kuala Lumpur, the Public Prosecutor had preferred two charges against the following seven accused persons, namely:

(i) Mohd Shafie b. Abdul Halim (the first accused);

(ii) Mohd Diah b. Sulaiman (the second accused);

(iii) Zulkipply b. Taib (the third accused);

(iv) Abdullah b. Musa (the fourth accused);

(v) Zamrin b. Zaid (the fifth accused);

(vi) Matilah @ Suadi b. Ismail (the sixth accused); and

(vii) Nizam Abdul Wahab (the seventh accused).

[2] The two charges against all seven accused persons reads as follows:

PERTUDUHAN PERTAMA

> Bahawa kamu bersama-sama bagi mencapai niat bersama kamu semua telah di antara 23 Disember 2008 kira-kira jam 10.15 malam hingga 24 Disember 2008 kira-kira jam 3.30 pagi bertempat di pejabat detektif D7, dalam ibu pejabat daerah Brickfields di dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja menyebabkan kecederaan kepada Prabakar a/l Bala Krishnan dengan tujuan untuk mendapatkan daripadanya pengakuan iaitu beliau telah melakukan satu kesalahan di bawah seksyen 506 Kanun Keseksaan yang boleh mendorong kepada satu pengesanan sesuatu kesalahan dan dengan itu kamu telah melakukan satu kesalahan di bawah seskyen 330 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan.

PERTUDUHAN KEDUA

> Bahawa kamu bersama-sama bagi mencapai niat bersama kamu semua telah di antara 23 Disember 2008 kira-kira jam 10.15 malam hingga 24 Disember 2008 kira-kira jam 3.30 pagi bertempat di pejabat detektif D7, dalam ibu

A pejabat daerah Brickfields di dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, telah dengan sengaja menyebabkan kecederaan kepada Solomon Raj a/l Chandran dengan tujuan untuk mendapatkan daripadanya pengakuan iaitu beliau telah melakukan satu kesalahan di bawah B seksyen 506 Kanun Keseksaan yang boleh mendorong kepada satu pengesanan sesuatu kesalahan dan dengan itu kamu telah melakukan satu kesalahan di bawah seskyen 330 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan.

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[3] The second accused, Mohd Diah b. Sulaiman, faced an additional charge under s. 193 of the Penal Code. The charge against him reads as follows:

D PERTUDUHAN KETIGA (UNTUK OKT 2 SAHAJA)

Bahawa kamu pada 31 Disember 2008 jam lebih kurang 3.00 petang bertempat di pejabat detektif D7, dalam ibu pejabat daerah Brickfields di dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, telah menyebabkan E Konstable Mohd Azuan Bin Mohd Shukor (RF 159740) mengatakan bahawa tiada soal siasat dijalankan ke atas penama Prabakar a/l Bala Krishnan dan Solomon Raj a/l Chandran serta tidak mengatakan perkara yang benar bahawa penama Prabakar a/l Bala Krishnan dan Solomon Raj a/l Chandran telah dicederakan akibat disiram air panas pada 23 Disember F 2008 yang mana kamu ketahui kenyataan-kenyataan tersebut adalah palsu dan dengan itu kamu telah melakukan satu kesalahan di bawah seskyen 193 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

[4] At the close of the prosecution case, the learned Hakim G Mahkamah Sesyen ("HMS") had acquitted and discharged the third to seventh accused persons on the first and second charge under s. 330 of the Penal Code. On the third charge under s. 193 of the Penal Code which is against the second accused only, the second accused was also acquitted and discharged at the close of H the prosecution case without his defence being called. At the close of the defence case, the first and second accused persons were found guilty and were convicted on the two s. 330 charges and sentenced to four years imprisonment in respect of each charge, such sentences of imprisonment to run concurrently with effect I from the date of sentence (4 October 2011).

[5] The Public Prosecutor, being dissatisfied with the order of acquittal and discharge of the third to seventh accused persons on the s. 330 charge, has filed an appeal in relation to the first and second charges. The appeal is registered as Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A-141-09-2011). The Public Prosecutor has also filed an appeal against the acquittal of the second accused, Mohd Diah b. Sulaiman, on the s. 193 charge. This appeal is registered as Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-142-09-2011. Meanwhile, the first accused, Mohd Shafie b. Abdul Halim and the second accused, Mohd Diah b. Sulaiman, being dissatisfied with the HMS's finding of guilt and conviction on the s. 330 charges and the sentence imposed of four years imprisonment in respect of each charge, which sentences were to run concurrently, had appealed against their convictions and sentences. Their appeals are registered as Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-152-10-2011 and Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-45-04-2012 respectively.

[6] The court had heard the appeals of Mohd Shafie b. Abdul Halim and Mohd Diah b. Sulaiman's appeals against their convictions and sentences before proceeding with the appeal of the Public Prosecutor against the acquittal and discharge of the third to seventh accused persons on the s. 330 charge followed by the appeal of the Public Prosecutor against the acquittal and discharge of the second accused on the s. 193 charge.

Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-152-10-2011 & Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-45-04-2012

[7] These are the appeals of Mohd Shafie b. Abdul Halim, the first accused, and Mohd Diah b. Sulaiman, the second accused, against their convictions on the two s. 330 charges and the sentences of four years imprisonment on each charge, such sentences to run concurrently with effect from the date of arrest. However, it must be noted that both appellants were granted bail pending the hearing of their appeals to the High Court.

[8] According to learned counsel for the appellant Mohd Shafie b. Abdul Halim ("Mohd Shafie"), grounds 3.1, 3.2 and 3.5 relates to the issue of the identification of the appellant. Other general issues would be dealt with by Encik Amer Hamzah Arshad, counsel for the appellant, Mohd Diah b. Sulaiman ("Mohd Diah") and these issues would be in relation to both Mohd Shafie and Mohd Diah.

[9] It is the appellant Mohd Shafie's submission that the learned HMS had failed to consider the fact that PW12 and PW14's identification of the appellant is highly suspect and cannot amount to strong grounds for finding that it was the appellant Mohd Shafie who had voluntarily caused them hurt. His argument is based on the following factors:

(i) the complainant PW12 had failed to identify the appellant at an identification parade ("ID parade") which was held only nine days after the incident. As can be seen in the Borang Kawad Cam at p. 844 of jilid 3 of the appeal records, the complainant Prabakar a/l Bala Krishnan ("PW12") had not identified the appellant, Mohd Shafie at the said ID parade;

(ii) PW12 did not know the appellant Mohd Shafie and had never met him before the incident. He could not confirm whether he had seen the appellant at the time that he was arrested at Desa Sri Hartamas; and

(iii) PW12 had also never met the appellant Mohd Shafie after the incident. The appellant had also played no role in taking the PW12 to the clinic after the incident.

[10] In these circumstances, learned counsel for the appellant Mohd Shafie had submitted that the identification of the appellant at the hearing after more than two years had passed would make his identification of the appellant very questionable.

[11] PW12 had attempted during re-examination to argue that he had not identified the appellant Mohd Shafie at the identification parade because he was in fear after the incident and the ID parade was held soon after the incident. However, it was pointed out by learned counsel that this evidence was obviously untenable because PW12 had identified the fourth accused, Abdullah bin Musa, at that same ID parade.

[12] On this issue as to the identification of the appellant Mohd Shafie by PW12, the court has scrutinised the findings of the learned HMS as found in his grounds of judgment. In his decision that a *prima facie* case was made out and that the defence should be called, the court was only able to discern the following finding:

> Saya telah meneliti dan membuat Penilaian dengan teliti atas isu kredibiliti saksi-saksi pendakwaan seperti yang dihujahkan oleh pihak pembelaan, terutamanya keterangan SP1, SP5, SP6, SP9, SP12

dan SP14. Saya mendapati keterangan mereka boleh dipercayai dan boleh diterima oleh Mahkamah ini berkait penglibatan tertuduh 1 dan tertuduh 2. Walaupun tidak dinafikan terdapat percanggahan di antara saksi-saksi ini, namun percanggahan tersebut bukanlah percanggahan yang boleh menjejaskan kes pendakwaan.

[13] And after the defence was called, on the issue of the identification of the appellants the learned HMS had this to say:

Mengenai isu pengecaman Tertuduh-Tertuduh oleh SP12 and SP14 yang dibangkitkan oleh pihak pembelaan. Saya telah meneliti isu ini dengan rapi dan mendapati tiada sebarang keraguan yang mencukupi untuk melihat Tertuduh-Tertuduh sejak tangkapan sehinggalah masa kejadian. Pada saya, tiada sebarang keraguan yang munasabah berjaya ditimbulkan oleh pihak pembelaan atas isu ini. Keterangan pihak pembelaan yang mengatakan mangsa-mangsa dan lain-lain saksi pendakwaan cuba membuat penganiayaan terhadap mereka juga tidak dapat diterima oleh mahkamah ini tanpa sebarang keterangan yang menyokong pengataan tersebut.

[14] The court notes that both at the stage of the close of the prosecution case as well as at the end of the defence case, the learned HMS had accepted the evidence of the prosecution witnesses with a bald statement of no doubts having been raised without condescending to any particulars especially from the point of the identification of the appellants by the complainants and the other witnesses.

[15] However, this failure of the learned HMS to state the basis for his findings cannot and should not, *ipso facto*, lead to the conclusion that no *prima facie* case was made out by the prosecution or that a reasonable doubt was raised by the defence. In such a situation, and as in the case of a non-speaking judgment, it is incumbent on the court hearing an appeal to scrutinise the evidence that was adduced before the lower court to see what the evidence adduced had in fact proved.

[16] In this case, the court notes that when the complainant PW12 was asked whether he had identified the first accused at the ID parade, his answer was an unhelpful "Tidak ingat". Coupled with the ID parade report D16, the court is satisfied that the complainant PW12 had NOT identified the appellant Mohd Shafie during the said parade. However, the court cannot arbitrarily dismiss the reasons given by the complainant PW12 as to why he had not identified the appellant Mohd Shafie. As to

whether those reasons given were truthful, whether he was in fact in fear of Mohd Shafie who had allegedly caused him much pain so much so that he was afraid to identify him during the ID parade can also be weighed and considered from the weight of the evidence of the complainants in court as well as that of the other witnesses in the sense of whether there was indeed independent evidence that it was the appellants who had caused hurt to the complainants.

The Evidence Of PW12 And PW14 As To The Hurt That Was Caused

[17] The evidence in court of both PW12 as well as PW14 points to the fact that the appellants had caused hurt to them. From their quite extensive evidence on this issue, some highlights of PW12's evidence can be gathered as follows:

(i) "Selepas digari dibelakang, Tertuduh 2 telah menendang dibahu saya dan saya jatuh" (p. 286);

(ii) "Selepas itu mereka (subsequently identified as both appellants) ambil getah warna hitam dan pukul kaki saya" (p. 286);

(iii) "Selepas dipukul, Tertuduh 2 bed getah kepada Tertuduh 1 dan Tertuduh 1 mula pukul saya di tapak kaki" (p. 288);

(iv) "Kemudian Tertuduh ambil air panas dari water dispenser dan Tertuduh 2 kata kamu tak nak mengaku lalu Tertuduh 2 simbah air panas pada saya" (p. 288);

(v) "Kemudian Tertuduh 2 telah ambil tiub getah dan pukul saya dan maki hamun saya" (p. 290);

(vi) "Selepas pukul dengan tiub, dia tanya mengaku salah atau tidak. Saya kata tidak. Dia kemudian curah air panas pada saya sekali lagi" (p. 290);

(vii) "Selepas itu Tertuduh 1 ambil tiub getah dan pukul saya dan kata "jika awak mengaku salah, saya akan lepaskan kamu". Saya tetap kata tidak mengaku salah. Kemudian Tertuduh 2 curah air panas atas saya - guna cawan yang sama" (p. 291);

(viii) "Tertuduh 1 pegang cawan air panas dan tanya samada mengaku salah atau tidak. Saya tidak mengaku salah. Tertuduh 1 kata "kamu masih degil" dan dia curah air panas atas saya" (p. 291); and

(ix) "Kemudian Tertuduh 2 bawa gayung dari bilik air dan ambil air panas dan tanya samada ingin mengaku salah atau tidak. Bila saya kata tidak mengaku salah, dia terus simbah air panas atas saya" (p. 291).

[18] As for PW14, some of the highlights of his evidence as regards the hurt that was caused to him appears as follows:

(i.) "Kemudian Tertuduh 2 suruh mengaku yang saya ada pergi pub minta duit. Saya kata tidak buat. Begitu juga dengan Prabakar. Bila dua kali kami cakap tidak - dia siram air panas" (pp. 345-346);

(ii) "Bila kami tidak mengaku, saya dan Praba kena pukul dengan paip plastik ditapak kaki. Tertuduh 2 yang pukul. Dia suruh mengaku dan kami tidak mengaku. Kemudian pegang air panas dan terus siram. Mula-mula dia pukul dengan paip, bila kami tidak mengaku, dia ambil air panas dan terus siram" (p. 346); dan

(iii) "Mula-mula air panas itu kena Praba, kemudian baru saya" (p. 347).

[19] The court is of the considered view that the testimonies of the two appellants clearly identified the appellants as persons who had beaten them with the paip getah as well as having simbah them with hot water on multiple occasions. This hurt was caused to them following their refusal to confess to the commission of some offence.

[20] The court has also considered the submissions of learned counsel for the appellant, Mohd Diah. His submissions can be divided into six broad issues, namely:

(i) Whether the elements under s. 330 have been established;

(ii) Whether the judgment of the learned HMS is a speaking judgment;

(iii) Whether there was a confession;

(iv) The discrepancies and contradictions in the prosecution case;

(v) Whether the witnesses were accomplices; and

(vi) Whether there was corroboration.

[21] The court proposes to deal with each of these broad areas in turn, but in no particular order.

Whether The Appellants Were Legally Incapable Of Obtaining A Confession/Whether The Elements Of An Offence Under S. 330 Of The Penal Code Had Been Made Out

[22] It is the submission of the appellant that the elements of the charge had not been made out. In this context, the second ground in the petition of appeal relates to the failure of the learned HMS to consider that the appellant was legally incapable of obtaining a confession from PW12 and PW14. The first ground relates to the issue of whether the learned HMS had erred when he found the element of "confession" under s. 330 to have been proved.

[23] What are the ingredients of a charge under s. 330 of the Penal Code? To fully comprehend the submissions and the line that is taken by counsel for the appellant, Mohd Diah, it is necessary to note the provisions of s. 330 of the Penal Code which reads as follows:

> Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to a fine.

[24] Learned counsel for the appellant Mohd Diah has pointed out the nature of the charges against the appellants is that they had voluntarily caused hurt to PW12 and PW14 with the intention of extorting a confession for the detection of an offence under s. 506 of the Penal Code. Reference was made to the judgment of the learned HMS where at p. 29 of the appeal records, he had dealt with this issue in just one sentence as follows:

> Berdasarkan kepada keterangan yang dikemukakan, saya mendapati kesemua intipati kesalahan di bawah seksyen 330 Kanun Keseksaan telah berjaya dibuktikan oleh pihak pendakwaan terhadap Tertuduh 1 dan Tertuduh 2.

[25] It is submitted that the appellants are not capable of extorting a confession from the complainants and therefore they could not have committed the offence. Reference was made to

s. 113 of the Criminal Procedure Code which clearly states that no statement made to a police officer in the course of a police investigation may be used as evidence against the person making the statement as well as to s. 25 of the Evidence Act 1950 which provides that no confession made to a polite officer below the rank of inspector shall be proved against that person. The appellants, Mohd Shafie and Mohd Diah, were sergeants.

[26] As such, it was submitted that the reasoning forming part of the learned HMS's grounds in concluding that a *prima facie* case had been made out was open to question.

[27] In the written submissions, the learned Deputy Public Prosecutor has submitted that the issue of s. 113 of the Criminal Procedure Code has no relevance because under s. 330 of the Penal Code, the burden which was placed on the prosecution was to prove that hurt had been caused to the complainants at the time when they were in the process of extorting a confession or when they were attempting to obtain information in relation to the commission of an offence. The learned Deputy Public Prosecutor has pointed out that there is no burden placed on the prosecution to produce a confession extorted for the purposes of proving an offence under s. 330 of the Penal Code.

[28] On this issue as raised by the appellants, the court has carefully scrutinised the provision of s. 330 of the Penal Code. The offence under this section is one of causing hurt in order to obtain information or confession having reference to an offence or misconduct. As is stated in *Ratanlal & Dhirajlal's Law of Crimes*, 25th edn. at p. 1693:

> The principal object of this section is to prevent torture by the police. But this section covers every kind of torture for whatever purpose it may be intended.

[29] The key ingredient of an offence under s. 330 is the causing of hurt. The hurt may be caused for various purposes, for extorting a confession or to obtain information, to restore or cause restoration of any property or valuable security or to satisfy any claim or demand. The court is of the considered view that there is no necessity that a confession should indeed have been successfully extorted nor is it material that the person who had caused the hurt was not a person who was legally capable of extorting a confession in the sense that such a confession, even if extorted, would not have been admissible in court. To decide

otherwise would be to go against the very spirit and intention of that section, namely to prevent the torture of detained persons by persons in a position of authority. If it can be argued that persons below the rank of inspector could not commit an offence under s. 330 that might well take away the weight of that section against those below that rank who cause hurt whilst attempting to extort a confession or to gain information which may lead to the detection of an offence.

A Non-speaking Judgment?

[30] One of the grounds in the petition of appeal is that the judgment of the learned HMS is not a speaking judgment. Learned counsel has referred the court to paras. 16 and 17 of the grounds as to the reasons why the appellants were called upon to enter on their defence. In this regard, paras. 16 and 17 of the said grounds are reproduced below as follows:

> [16] Kedua-dua mangsa telah disuruh untuk mengaku kepada kesalahan pecah pub dan meminta wang.
>
> [17] Pengakuan mangsa boleh mengakibatkan mereka bertanggungan kepada kesalahan di bawah S. 506 KK iaitu ugutan jenayah yang telah dilaporkan sebelum itu.

[31] Learned counsel for the appellant Mohd Diah has submitted that the evidence adduced does not support the HMS's findings. At p. 290 of the appeal records, PW12 had testified that "Tertuduh 2 suruh mengaku salah untuk kejadian memecah pub. Selepas itu Tertuduh 2 telah curahkan air panas atas saya." And at p. 350 of the appeal records, PW14 had testified that after "Tertuduh 6" had taken him to the next room, "Dia suruh mengaku buat salah kerana minta duit di pub". "Dia" in the context of PW14's evidence refers to "Tertuduh 6" that is Matilah @ Suadi b. Ismail. Although he had seen the first, second and sixth accused in the first room, however in the second room there was only himself and the sixth accused.

[32] As such, learned counsel had submitted that the above evidence of PW12 and PW14 contradicts each other as regards who had forced them to confess, and the offence which they were being forced to confess to. However, this was not considered at all by the learned HMS.

[33] On the effect of an alleged non-speaking judgment or a non-speaking judgment, the court is of the considered view that the failure of a trial court to state in its grounds that a particular issue was considered does not lead automatically to the conclusion that it had not been considered or at all. A non-speaking judgment would invariably cause a great deal of difficulty to the court sitting in its appellate jurisdiction to understand the evidence which was considered by the trial court. Be that as it may, even if a judgment is in fact a non-speaking judgment, it would still be incumbent upon the court to carefully peruse and weigh the evidence that was adduced at the lower court to ascertain if the conclusions reached by the lower court were in fact properly arrived at.

Discrepancies

[34] On the issue of the discrepancies in the evidence of the prosecution witnesses which had been raised as one of the grounds in the petition of appeal, the court notes that the learned HMS had acknowledged in his grounds of judgment that there were some discrepancies between the evidence of the witnesses. The relevant portion of his grounds which appears at pp. 29-30 reads as follows:

> Walaupun tidak dinafikan terdapat beberapa percanggahan di antara saksi-saksi ini, namun percanggahan tersebut bukanlah percanggahan yang material yang boleh menjejaskan kes pendakwaan.

[35] Learned counsel for the appellant, Mohd Diah, had pointed out that the learned HMS did not state what those discrepancies were that he found to be not material discrepancies. It was submitted that the HMS should have set out what the discrepancies were. In line with this submission, learned counsel had set out the discrepancies, which are itemised as follows:

(i) The complainant, PW12, was not able to identify the appellant Mohd Shafie at the ID parade but was able to identify him in court;

(ii) From the evidence of the two complainants, PW12 and PW14, they were allegedly being asked to admit to different offences;

(iii) The discrepancies between the two police reports which were made by PW12. Whereas in the first report (Brickfields report 018339/08), he had not given the names of those who had allegedly "seksa" him, however in the second report (Brickfields report 000471/09), he had given a list of 11 names as persons whom he believed had detained and assaulted him. This information was not from his own knowledge but was admittedly obtained from some other person;

(iv) The evidence of PW12 at p. 307 that he was unsure as to who had "seksa" him;

(v) The evidence of PW12 at p. 321 of the appeal records that the second accused had telephoned him to say that if anyone asks, to inform that mee soup had accidentally splashed on his body ("mee sup tersimbah di badan saya") compared with the evidence of PW7 who had testified that PW12 had informed him that he "terkena mee kari"; and

(vi) The evidence of PW14 at p. 351 of the appeal records where he says that it is the sixth accused who had scalded him with hot water.

[36] Learned counsel for the appellant has submitted that by failing to identify or disclose the discrepancies in the evidence of the prosecution witnesses, the judgment of the learned HMS would have prejudiced the appellant who would have been left guessing whether the HMS had correctly appreciated the evidence of the witnesses. It was further submitted that since the learned HMS had failed to identify which part of the evidence of the prosecution's witnesses were contradictory to each other; the court as well as the appellant would have been deprived of an opportunity to evaluate the reasoning of the learned judge. In this context, reference was made to Singaporean case of *Thong Ah Fat v. Public Prosecutor* [2011] SGCA 65 where the Court of Appeal had said as follows:

> In order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen if the judge states his reasons.
>
> …

> A legal decision will therefore be deprived of many of its illocutionary forces if no sufficient reason is stated, simply because there can be no ground for one to stand on to defend its correctness. A legal judgment today cannot be justified solely by the judge's statement of belief that it is right, without providing any explanation as to why it is so. The days when it sufficed for a Judge to say 'Because I say so' are well behind us. The legal cogency and coherence of a decision must therefore also be demonstrated to justify it.

[37] Before me in court, the learned Deputy Public Prosecutor was only able to state quite unhelpfully that the evidence of PW12, PW14, PW5, PW6 and PW9 were found to be credible. In light of this bare statement, the court had thus to delve into the written submissions that had been filed on behalf of the respondent.

[38] It is the respondent's submission that the learned HMS was correct when he found that the evidence of PW12 and PW14 were supported by the evidence of the prosecution witnesses, PW5, PW9, PW1 and PW6 when they said that they saw the two complainants being injured by the appellants through being hit using a rubber pipe and being splashed with hot water ("yang mengatakan serta nampak kedua-dua mangsa telah dicederakan oleh pihak perayu 1 dan 2 dengan menggunakan paip getah dan menyimbah air panas ke atas kedua-dua mangsa tersebut."). The question that arises for the consideration and determination of the court is whether this was in fact so - whether the evidence of PW5, PW9, PW1 and PW6 had indeed supported the evidence of the complainants. The court had thus gone into the notes of evidence that was recorded in the court below to ascertain the evidence that was adduced before the learned HMS and whether the said evidence contained credible evidence which had successfully proven the ingredients of the charge against the appellants.

[39] The court notes that PW5 is Kons. Mohd Azuan b. Mohd Shukor. In the earlier part of the night of 23 December 2008, he was involved in Ops Noda which was an operation against massage parlours and prostitution dens. Amongst those who were involved in Ops Noda that night were the appellants. That night, after the Ops, PW5 together with Kons Sefri ("PW9") were directed by PW1, Chief Inspector Shaharudin bin Tahir, to escort the two complainants, Prabakar and Solomon, to pejabat D7. The complainants were handcuffed.

[40] PW5 testified that at pejabat D7, the appellants had conducted an interrogation of the two complainants. His evidence as to what occurred during the interrogation is very pertinent to the case and is thus reproduced below at some length:

> Semasa soal siasat, Sjn Shafie dan Mat Diah tanya adakah mereka terlibat dalam kes pemerasan di Sri Hartamas.
>
> Kedua-dua suspek tidak mengaku.
>
> Sjn Shafie dan Mat Diah ada marah-marah dan menengking kedua suspek itu.
>
> Kedua-dua suspek masih tidak mengaku dan menafikan terlibat.
>
> S : Apa Sjn Mat Diah buat?
>
> J : Dia ambil gelas atau cawan, dan terus pergi ke water dispenser isi air.
>
> S : Dari bahagian mana dia isikan air?
>
> J : Dari bahagian warna merah.
>
> Sjn Mat Diah ada tanya lagi pada saspek samada terlibat dan dimana Jo. Selepas dia isi air.
>
> Suspek masih tidak mengaku dan menafikan terlibat.
>
> Kemudian Sjn Shafie ada tanya fasal motor yang diguna oleh Prabakar dan samada dia terlibat dalam kes pemerasan. Kedua-dua suspek masih tidak mengaku.
>
> Sjn Mat Diah marah-marah dan terus simbah air panas itu pada kedua-dua tertuduh.
>
> Kedua-dua tertuduh mengerang kesakitan dan menjerit sakit.
>
> Mat Diah dan Shafie ada beberapa kali simbah kedua-dua suspek dengan air panas.
>
> Setiap kali disimbah, mereka mengerang kesakitan dan menjerit supaya tidak dilakukan sedemikian.
>
> Setelah disimbah, mereka rebah ke bawah.
>
> Saya tahu air panas kerana diambil dari bahagian merah dan nampak wap.

[41] Further evidence was adduced from PW5 that after Solomon was taken by Kpl Abdullah to the next room to have his evidence taken, Kpl Abdullah had said to Sjn Mohd Diah: "cukup, dahlah". And thereafter there is the following extract from the evidence of PW5:

> Kemudian Sjn Shafie ambil gayung, isi air dan acah-acah supaya dia Prabakar mengaku terlibat dalam pemerasan di Sri Hartamas.
>
> Prabakar masih tidak mengaku.
>
> Bila Prabakar masih tidak mengaku, Sjn Mat Diah menengking dan marah-marah pada Prabakar.
>
> Saya nampak Sjn Mat Diah jadi betul-betul marah dan terus curah pada badan Prabakar.
>
> Selepas disimbah, Prabakar jatuh ke bawah dan mengerang kesakitan.
>
> Kemudian Sjn Shafie pula isi air panas dalam gayung dan tanya apakah dia terlibat. Prabakar tidak mengaku dan Shafie terus simbah air ke badan Prabakar sekali lagi.

[42] During cross-examination, it was suggested to PW5 that after the incident, the appellant Mohd Shafie had come into the room and had seen the two complainants with wet clothes. However, PW5 denied that he had made up the story to avoid being charged. In the main, the court notes that PW5's evidence as to the actions of the two appellants in splashing hot water on the complainants a number of times stood firm despite rigorous cross-examination.

[43] The respondent had also relied on the evidence of is Kons. Sefri bin Mohamad Arsad (PW9). It was PW9, who together with PW5, had escorted the complainants to pejabat D7 on the night in question. The court notes his evidence as to the interrogation of the complainants by the appellants and the hurt that was caused to the complainants. The essence of his evidence at p. 233 onwards appear below as follows:

> Kemudian Sjn Mat Diah ambil sebuah cawan dan isi air panas dalam cawan itu dan pegang cawan itu sambil soal siasat 2 lelaki itu.
>
> Saya nampak 2 lelaki India itu dalam ketakutan.

A Kemudian Sjn Mohd Diah bertindak menyimbah kedua-dua lelaki India itu dengan air panas dan kedua-dua lelaki India meraung kesakitan dan minta jangan berbuat demikian.

Kemudian Sjn Mat Diah dan Shafie teruskan soal siasat dan mereka seakan-akan memaksa 2 lelaki India itu untuk mengaku.

B

Sjn Shafie masuk dalam tandas dan ambil gayung dan kemudian bawa masuk ke dalam pejabat.

Dia letak gayung atas almari, sambil pegang gayung itu, dia teruskan soal siasat dan suruh mengaku.

C

Kemudian dia bertindak ambil gelas yang sama dan isi air panas dan soal kedua-dua lelaki India.

Sjn Shafie juga bertindak simbah 2 lelaki India ini dengan air panas.

D

Kemudian Koperal Dollah sampai, ketika itu Sarjan Mohd Diah dan Shafie buat soal siasat sambil pukul-pukul kedua-dua lelaki India itu.

Koperal Dollah panggil Sarjan Mohd Diah dan minta diberhentikan.

E

[44] At one stage, PW9 went out to smoke in the corridor by himself. And when re-entered the room, the appellants were still interrogating PW12. According to his evidence at p. 236:

F

Kemudian Sarjan Shafie simbah Prabakar dengan air panas kerana Prabakar kesakitan.

Kemudian Sarjan Shafie tadah air lagi sambil bercakap dengan Prabakar supaya mengaku.

G

Kemudian dia simbah Prabakar dengan air panas dan diikuti oleh Sarjan Mohd Diah.

Saya nampak Prabakar mengerang kesakitan dan minta jangan teruskan.

H

[45] During cross-examination, PW9 denied that he was giving false evidence in court in order to victimise the appellants. However, he had admitted that the first statement that he had given in this case to the effect that there was no interrogation carried out after the arrest and that the complainants were not abused was false. In his second statement made two or three days after the first statement, he had stated that his first

I

statement was not correct. He explained during re-examination that he had lied during his first statement because of instructions received from Chief Inspector Shah not to tell the truth to ASP Zulfikar.

[46] And what about the evidence of PW1 whose evidence the respondent had submitted would support the prosecution's case about the complainants being assaulted by the appellants? PW1 is Chief Inspector Shaharudin bin Tahir. After carrying out Ops Noda on reflexology centres on the night in question and on their way back to IPD Brickfields, PW1 and his raiding team had passed an entertainment centre called My Place at Sri Hartamas. When they passed the pub, PW1 had seen two male Indian jockeys standing beside a motorcycle. Sjn Mohd Diah had informed him that the motorcycle was involved in a reported case of criminal intimidation. After an examination, the two male Indians and the motorcycle were brought back to the balai for further investigation.

[47] According to PW1, he had directed Sjn Mohd Diah to interrogate the two male Indians to obtain information in respect of the criminal intimidation that was suspected to have been committed by the two male Indians. It was after he had arrived home that he had learnt about the incident of the two complainants having been scalded with hot water.

[48] PW1 had then gone back to IPD and arrived there at about 2am. He saw five to six persons at the office, including the appellant Mohd Diah. He saw the two complainants who were in two separate rooms. He saw the injuries on the bodies of the complainants. He had directed that Prabakar was to be put into the Brickfields lock-up and Solomon to the Petaling lock-up because he was underaged. He had then gone home.

[49] As such, from PW1's evidence, he was not present when the alleged scalding incident took place. Further, he did not give any instructions to the appellants for the complainants to be injured in any way. However, the court notes that after coming to know about what had occurred to the complainants at the D7 office and after having seen their injuries, he had not asked them whether they would like to lodge a police report. As such, his only contribution or evidence in support of the prosecution case would appear to be the fact that after receiving the SMS from D/LKpl Zalifah ("PW6") and learning about the "badan tertuduh melecur",

A he had gone back to the office and had seen the two complainants with injuries on their bodies. His evidence would thus confirm that the two complainants had sustained injuries on their bodies on the night/morning in question.

B **[50]** As regards D/LKpl Zalifah binti Mahmud (PW6), it is her evidence that when she had gone back to the D7 office at 11.50pm on 23 December 2008 to type her report, she had found both the carpet as well as her chair wet. She saw Kons Azwan ("PW5") and Sefri (PW9) as well as Matilah (the fourth accused) C and Prabakar (PW12) in the office. Prabakar's hands were cuffed to the rear and his eyes were covered with a white cloth.

[51] Whilst she was typing her report, she heard Prabakar moan in pain. She saw Matilah take water from the water dispenser with a gayung and go to the back room and after that she heard D Solomon shouting in pain from the back room. She knew that it was Solomon because his voice was different from the voices of the other police personnel. When she left the room, she saw the appellant Mohd Diah in the other room.

E **[52]** PW6 had also testified as to how Mohd Diah had informed her that the arrest report had yet to be made. The reason given by Mohd Diah was "susah sikit. Tertuduh cedera". And when she asked "cedera macam mana?" Mohd Diah had informed that the accused's body was "melecur".

F

[53] PW6 felt that the matter should have to be informed to the arresting officer, CI Shaharudin ("PW1") and she had duly SMS to him indicating that the arrest report was yet to be made because there was a problem with the suspect being injured.

G

[54] Based on the above evidence, the court is satisfied that quite apart from the evidence of PW12 and PW14, it is the evidence of PW5 and PW9, and to a lesser extent PW6 and PW1 which would clearly identify the appellants and set out their H various actions in relation to the beating of the complainants with the paip getah and the scalding with hot water and consequently establish the commission by the appellants of the offence charged. The court is of the view that if there were any doubts about the identification of the appellants as being the persons who had I caused hurt to the complainants following the non-identification of the appellant Mohd Shafie by PW12 during the ID parade, that doubt would have been resolved by the evidence of PW5, PW9 and to a lesser extent, by PW6.

Whether PW1, PW5, PW6 And PW9 Are Accomplices/The Need To Corroborate The Evidence Of Accomplices

[55] However, learned counsel for the appellant Mohd Diah has submitted that PW1, PW5, PW6 and PW9 are accomplices, that their evidence is suspect and lack corroborative value. The complaint in this regard is that the learned HMS had only once mentioned corroboration and that is when he had held that it was not safe to call on the defence of the third, fourth, fifth and sixth accused persons. As such, it was submitted that there was no proper judicial appreciation of the evidence on this issue as the learned HMS had blown "hot and cold in the same breath" on the evidence that was adduced before him.

[56] What is an accomplice? An accomplice is a participant in the crime. His role may be primary or secondary. As submitted by learned counsel for the appellant Mohd Diah, the correct test to be applied in determining whether a witness is an accomplice is stated by Gopal Sri Ram JCA in the case of *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37 where His Lordship had referred to the case of *Chao Chong & Ors v. Public Prosecutor* [1959] 1 LNS 11; [1960] 1 MLJ 238 where Thomson J had held as follows:

> The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted.

[57] The court has carefully perused and weighed the evidence of PW5, Kons. Mohd Azuan b. Mohd Shukor and PW9, Kons. Sefri bin Mohamad Arsad, the two constables who had escorted the complainant to the pejabat D7. It is true that they were physically present for part of the time when the complainants were assaulted and "simbah" with hot water. It is also true that they did not take any overt action to stop the assault on the complainants. As for PW6, D/LKpl Zalifah binti Mahmud, evidence would point to the fact that she would have come back to the D7 office only after the initial assaults on the complainants had occurred. She had allegedly heard some moans from Prabakar and shouts of pain from Mohd Diah in the back room but there is no

A evidence that she herself had assaulted the complainants in any way. As for Chief Inspector Shaharudin bin Tahir ("PW1"), although he was instrumental in directing that the complainants be arrested and brought back for questioning, he was not present when the complainants were assaulted and according to him, he
B had not given any instructions for the complainants to be assaulted. There is also no suggestion from the appellants that PW1 had ever given any instructions for the complainants to be assaulted in any way.

C **[58]** The "involvement" of PW1, PW5, PW6 and PW9, if it can be regarded as "involvement" would appear to have come after the assaults when there was an agreement of sorts to say that:

(i) There was no interrogation of the complainants; and

D (ii) There was no assault on the complainants.

This conspiracy of silence or conspiracy to lie came about when Bukit Aman had entered the picture to investigate the assaults on the complainants. The court notes an agreement of sorts between
E various persons to inform the Bukit Aman investigators that on the eventful day/night in question, no interrogation had been conducted in relation to the complainants and no one had assaulted or tortured them.

F **[59]** The court is of the considered view that there is a real and appreciable difference between a common intention between perpetrators to commit an offence under s. 330 of the Penal Code read with s. 34 and an attempt to cover up a commission of an offence. Based on the facts of the present case, the court is
G unable to see that the actions of PW1, PW5, PW6 and PW9 would amount to acts of causing hurt to the complainants for the purpose of extorting a confession or for obtaining information from them. The court is also unable to see any evidence adduced of a common intention between these persons with the appellants to
H commit an offence under s. 330.

[60] The court finds that the presence of PW5 and PW9 in the room when the complainants had suffered hurt and abuse, without more, is insufficient for the court to conclude that they were complicit in the abuse or that they were accomplices of the
I appellants. The court has taken note of the ranks of PW5 and PW9 who were but lowly constables compared with the appellants

who were both sergeants. At the time of the commission of the offence, PW5 had admittedly been with D7 for only a month. He was a greenhorn who admitted that he took instructions from both appellants. His discomfort with what was happening is borne out with his evidence that he had left the room briefly on a number of occasions. The court accepts PW5's explanation that being only a constable, he could not have stopped the appellants from doing what they were doing. Whilst the court is of the considered view that PW5 and PW9 should have at least attempted to stop something that was quite obviously wrong, the fact that they did not do so is a moral failing which they would have to live with. However, this moral failing in not attempting to stop their superior officer is, in the court's view, insufficient to taint them with the same brush as the appellants in terms of liability, responsibility and complicity for the commission for the offence, such as to render them as accomplices. Similarly, the court is unable to find that their subsequent agreement with the perpetrators of the offence to mislead the Bukit Aman officers were sufficient to imbue them with liability for an offence under s. 330 of the Penal Code. So too with PW6. The court is unable to find that her subsequent actions in not properly reporting what had occurred would have the effect of making her an accomplice in the commission of the offence by the appellants.

[61] As far as PW1 is concerned, the court does see so much more that could have been done by him as the senior officer of the appellants. Upon being alerted as to what had occurred, he was sufficiently concerned to return to the office in the early hours of the morning. There he had seen the injuries on the complainants. However, instead of directing that they be given proper and immediate medical attention and an opportunity for lodging a police report against the perpetrators, instead of taking action against the appellants himself, all that he had done was to direct that the complainants be put into the lock-up. The court sees this as evidencing a grave moral and ethical failing, a lack of responsibility on the part of PW1 in carrying out his duties and responsibilities. However, and this must be emphasised, this failing is not sufficient to render him as an accomplice of the appellants in the commission of the offence under s. 330 of the Penal Code.

[62] As such, the court finds that PW5, PW9, PW6 and PW1 were not accomplices of the appellants in the commission of the offence under s. 330 of the Penal Code against the complainant. The court finds that their evidence in the main to corroborate

each other and the complainants in material particulars. The court finds that they are credible witnesses notwithstanding their admitted attempt to mislead the Bukit Aman investigators about the interrogation of the complainants and the hurt that was caused to them.

[63] In light of the above findings and corroborated by the medical evidence as to the injuries that were sustained by the complainants as well as the photographs of the injuries (in living colour), the court is satisfied that the learned HMS was not in error when he had found that a *prima facie* case had been made out against the appellants and later that the prosecution had made out a case against the appellants beyond all reasonable doubt.

The Sentence

[64] In an appeal against the sentence, the appellants have submitted that the learned HMS had failed to take into account the principles of sentencing as well as failing to consider the mitigation that was forwarded by the appellants. The appellants contend that the learned HMS had failed to take into account the interest of justice which would include both a consideration of the interests of the appellant as well as the public interests. In this regard, it is submitted that there was a failure to consider that the appellants were first offenders.

[65] Various cases on the principles of sentencing have been forwarded for the consideration of the court (*PP lwn. Mohamad Tawakal* [2012] 7 CLJ 372; [2013] 1 MLJ 759; *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421; [2005] 2 MLJ 116; *New Tuck Shen v. PP* [1982] CLJ 38B; [1982] CLJ (Rep) 606; [1982] 1 MLJ 27; *PP v. Mohd Fuad Othman* [2000] 1 LNS 190; [2001] 5 MLJ 549; *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256; *Public Prosecutor v. Chew Chee Wah* [1996] 1 CLJ 94; [1995] 4 MLJ 26; *PP v. Karthiselvam Vengatan* [2008] 1 LNS 32; [2008] 3 MLJ 368; *Mohd Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167; *Raja Izzuddin Shah v. Public Prosecutor* [1978] 1 LNS 165; [1979] 1 MLJ 270 and *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441.

[66] In reiterating the various mitigating circumstances as put forth by learned counsel for the appellant Mohd Diah, it was submitted that the most appropriate sentence was a bond under s. 294 of the Criminal Procedure Code. It was submitted that the

appellant Mohd Diah is 48 years old and a first offender. He has a wife and five schoolgoing children, with the eldest being a special needs child requiring special care. It was submitted that it would be against the interests of justice to punish him so as to disqualify him from continuing in the service of the Royal Malaysian Police Force. A conviction would render him jobless and unable to earn his livelihood. As such, what was in fact being prayed for was a binding over under s. 294 of the Criminal Procedure Code.

[67] For the respondent, it was submitted that the sentence of four years imprisonment in respect of each charge for each of the appellants was fair and reasonable ("wajar dan munasabah") as the learned HMS had considered both the mitigating circumstances as well as the aggravating circumstances before sentencing the appellants.

[68] The court has carefully perused the learned HMS's grounds in relation to the appropriate sentence to be imposed. The court is satisfied that the learned HMS had considered both the mitigating circumstances advanced by the appellants which he had reiterated in quite some detail. He had also considered the submissions of the learned Deputy Public Prosecutor for a deterrent sentence in this case especially in view of the seriousness of an offence under s. 330 of the Penal Code and the public interest. The learned HMS had referred to the case of *PP v. Muhari Mohd Jani & Anor* [1999] 8 CLJ 430 where KC Vohrah J had referred to an offence under s. 330 as "one of the most serious offences known in law and the court must show its abhorrence of it; and the public interest requires the court to pass a deterrent sentence on the offender to deter likely offenders."

[69] In this case, the appellants being long-serving members of the rank of sergeants in the Police Diraja Malaysia who should have protected members of the public such as the complainants had instead used their powers arbitrarily not to uphold the law but to inflict violence and hurt on the very persons whom they are duty bound to protect. Such outrageous acts of the appellants in scalding arrested persons while they are cuffed and impotent to protect themselves would amount to an aggravating factor for which the learned HMS had rightly rejected a sentence of a binding over as prayed for by counsel.

[70] Looking at all the factors of the case, the court is unable to say that the learned HMS was in error when he imposed a sentence of four years imprisonment in respect of each of the two charges on the appellants, such sentences to run concurrently with effect from the date of their arrest. The court is unable to say that such sentences were manifestly excessive taking into account that the maximum penalty under s. 330 of the Penal Code is imprisonment for a term which may extend to seven years and shall also be liable to a fine.

[71] Accordingly in respect of the appeals of Mohd Shafie b. Abdul Halim and Mohd Diah b. Sulaiman in 42S(A)-152-10-2011 & 42S(A)-45-04-2012, the court herewith dismisses both their appeals against conviction as well as sentence. The conviction and sentence of the learned HMS is herewith confirmed with the sentences of four years imprisonment each in respect of each of the charges to run concurrently with effect from today.

Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-141-09-2011

[72] This is the Public Prosecutor's appeal against the acquittal and discharge of the third to seventh accused persons at the close of the prosecution case without calling for their defences on a charge under s. 330 of the Penal Code read with s. 34.

[73] Basically the grounds of appeal of the appellant Public Prosecutor is that the learned HMS had erred in law and in fact in finding that the prosecution had not made out a *prima facie* case against the third to seventh accused persons and not calling on them to enter upon their defence. What then is the evidence adduced by the prosecution witnesses to prove its case against these accused persons?

The Third Accused – Zulkipply Bin Taib

[74] The third accused or respondent 1 is Zulkipply bin Taib. According to the learned Deputy Public Prosecutor, the evidence of PW12 as found at p. 293 of the appeal records will show the involvement of the third accused. There, PW12 had testified as follows:

> Kemudian Tertuduh 3 telah pukul saya dengan tiub getah ditapak kaki.

[75] The court notes that at this point of time when PW12 was allegedly beaten by the third accused, PW12 was then blindfolded. The question arises as to how he was able to see the third accused to be able to testify that it was the third accused who had beaten him with the rubber tube. And what about the evidence of the other police personnel who were present at the material time? Did their evidence also point to the involvement of the third accused in beating PW12?

[76] Learned counsel for the respondent Zulkipply bin Taib had submitted that PW5's evidence had not corroborated the evidence of PW12 as regards the involvement of the said respondent. At p. 146 of the appeal records, PW5 has testified as follows:

> Selepas saya masuk semula ke bilik itu, Sjn Zul baru sampai dan duduk dimejanya. Dia tanya pada Prabakar samada terlibat dengan kes pemerasan di Sri Hartamas. Sjn Zul beritahu jika ada betul-betul terlibat - beritahu perkara sebenar. Nadanya sederhana tinggi tetapi macam acah-acah dengan body language - tegas bukan macam nak pukul. Prabakar masih menafikan.
>
> Kemudian Sjn Zul keluar dari bilik.
>
> Sjn Zul kemudian datang dan kata ada tangkapan. Dia minta saya, Sefri dan Nizam untuk ikut dia pergi ke Taman Tun Dr Ismail bersama Pegawai penyiasat - untuk buat tangkapan - bukan kes berkait Prabakar.

[77] As far as PW6, is concerned, there was no evidence whatsoever to connect the third accused person to the injuries that were sustained by PW12 and PW14.

[78] According to PW9, what the third accused did was as follows:

> Kemudian Sarjan Zul masuk dan dekati Prabakar. Dia soal Prabakar agar cerita yang sebenar. Dia bersembang dengan Prabakar ... Kemudian Sarjan Zul beritahu saya dan Azwan untuk buat tangkapan di Taman Tun. Kemudian, tidak lama kemudian, saya, Sarjan Zul, Azwan telah pergi ke TTDI.

[79] According to PW12, the third accused was there but had not beaten him.

[80] Thus looking at all the accumulated evidence of the complainant and other material prosecution witnesses as outlined above, the court is unable to find any evidence of any involvement of the third accused with the beatings and scalding of the

A complainants by Mohd Shafie and Mohd Diah. There is also no evidence whatsoever that would point to the fact that the third accused had a common intention with Mohd Shafie and Mohd Diah to cause hurt to the complainants in order to extort a confession or to obtain information that may lead to the detection
B of an offence.

[81] As such, as far as the third accused (first respondent), Zulkipply bin Taib, is concerned, the court is satisfied that the learned HMS was not in error in finding that a *prima facie* case
C had not been made out against him on the charges and consequently acquitting and discharging him without calling for his defence.

The Fourth Accused, Abdullah Bin Musa

D **[82]** After perusing the evidence adduced by the prosecution, the court is only able to discern that it was the fourth accused, Abdullah, who had "ambil Solomon". In fact the learned Deputy Public Prosecutor had not submitted that there was any evidence against the fourth accused. In light of this development, the court
E is satisfied that there are no merits whatsoever in the appellant's appeal against the acquittal and discharge of the fourth accused, Abdullah bin Musa, at the close of the prosecution case without calling for his defence.

F *The Fifth Accused – Zamrin Bin Zaid*

[83] From the evidence adduced, it would appear that the only reference to the fifth accused is to be found at p. 146 of the appeal records when PW5 had testified that "Kemudian Kpl
G Zamrin datang. Dia masuk dan tanya Prabakar mana Jo, adakah kau terlibat kes pemerasan di Sri Hartamas." There is no evidence of the fifth accused having caused any hurt to either of the complainants and neither is there any evidence pointing to the existence of a common intention with Mohd Shafie and Mohd
H Diah to cause hurt to the complainants.

[84] As such, the court finds that the learned HMS was not in error when he found that a *prima facie* case had not been made out against the fifth accused, Zamrin bin Zaid, and acquitted and discharged him at the close of the prosecution case without calling
I for his defence.

The Sixth Accused – Matilah @ Suadi B. Ismail

[85] The court notes that PW14 had, in the course of his evidence, pointed to the involvement of the sixth accused. This can be seen at pp. 347 to 348 of the appeal records where the evidence of PW14 appears as follows:

> Setelah disiram 2 atau 3 gelas, Tertuduh 2 suruh mengaku, kami tidak mengaku. Tertuduh 6 datang dan ambil kain putih dan ikat mata saya. Sebelum dia ikat mata saya, dia bawa saya seorang ke bilik satu lagi -bilik di sebelah kanan gambar (d).

[86] And at p. 350, PW14 had stated as follows:

> Setelah itu, Tertuduh 6 bawa ke bilik sebelah. Di bilik itu, Tertuduh 6 ikat mata dan dia suruh mengaku.
>
> Dia ikat dengan kain putih.
>
> Dia suruh mengaku buat salah kerana minta duit di Pub.
>
> Saya jawab tidak buat.
>
> Kemudian dia siram air panas - saya rasa panas dan pedih.
>
> Saya tidak tahu dia ambil air panas dari mana kerana tidak nampak.
>
> Saya tidak nampak dia guna apa untuk ambil air panas.
>
> Saya tahu Tertuduh 6 yang siram air panas kerana suara yang sama.
>
> Selepas siram dan luka, dia buka ikat mata dan saya nampak dia juga.
>
> Dia siram dari belakang, saya gerak badan dan dia nampak luka, kemudian dia berhenti.
>
> Di bilik pertama nampak Tertuduh 1, 2 dan 6.
>
> Semasa di bilik kedua, hanya saya dan Tertuduh 6 sahaja.
>
> Tertuduh 6 siram air panas lebih kurang 4 kali.

[87] Is this evidence of PW14 implicating the sixth accused corroborated by any other witnesses? The court notes that PW5 had in his evidence testified as to the actions of the sixth accused as follows:

> Saya nampak Matilah ada pukul-pukul, sepak kaki Prabakar.

[88] In light of this evidence, the court has re-examined the evidence of PW12 but is unable to find any direct reference to his being assaulted by the sixth accused. Although at p. 292, PW12 had testified that some unknown person had covered his eyes with a piece of white cloth and had beaten the soles of his feet with a rubber tube, he was unable to say who it was who had beaten him.

[89] In light of the fact that PW12 was unable to say who it was who had beaten him and there is no other evidence to link the sixth accused with beating PW12, the court finds that the prosecution had not succeeded in proving that the sixth accused had assaulted PW12. And whilst PW14 had claimed that the sixth accused had scalded him with hot water four times, the court finds that this evidence has to be taken cautiously in light of the following factors:

(i) From PW14's account, at the material time of the scalding with hot water, he was blindfolded;

(ii) He did not see from where the sixth accused had obtained the hot water and he did not know what was used to contain the hot water which was used to scald him;

(iii) He was scalded from behind;

(iv) He knew it was the sixth accused because he recognised the voice; and

(v) After PW14 was scalded, his blindfold was opened and he saw the sixth accused.

[90] From the above evidence, the court is faced with grave doubts as to whether there is credible evidence to link the sixth accused with the hurt that was caused to PW14. The court is not convinced of the identification of the sixth accused through his voice. There is no evidence that PW14 and the sixth accused had known each other before the incident or that PW14 was familiar with the sixth accused's voice. There was no evidence that any form of voice identification was carried out to identify the sixth accused through his voice. The identification of the sixth accused as the person who had scalded PW14 was further suspect because he was not only scalded from the rear but he was blindfolded at the material time. Last but by no means least, other

evidence adduced from the other witnesses points to the appellant Mohd Diah as the person who had carried a gayung of hot water into the room where PW14 was.

[91] Based on the above factors, the court has carefully considered and weighed the evidence that was adduced against the sixth accused but regrets that it is unable to find that there was sufficient credible evidence to link the sixth accused with the offences as charged. As such, the court finds that the appellant has not succeeded in proving that that the learned HMS was in error when he found that that the prosecution had not succeeded in making out a *prima facie* case against the sixth accused on the charges.

The Seventh Accused – Nizam Bin Abdul Wahab

[92] As with the second accused, the court finds that there is no evidence to link the seventh accused with the hurt that was caused to the two complainants. The court notes that the only reference to the seventh accused was when PW9 had testified that the seventh accused had looked into the office ("jengok dalam pejabat") and had shaken his head ("geleng-gelengkan kepala"). Poking his head into the office and shaking his head at the antics of the persons inside the office cannot conceivably amount to there being a common intention with Mohd Shafie and Mohd Diah to commit an offence under s. 330 of the Penal Code against the two complainants.

[93] In conclusion, the court is satisfied that the Public Prosecutor's appeal against the acquittal and discharge of the third to seventh accused persons (first to fifth respondents) without calling for their defences in 42S(A)-141-09-2011 is without merit. The Public Prosecutor's appeal is thus dismissed and the order of acquittal and discharge of the third to seventh accused by the learned HMS is herewith confirmed.

Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-142-09-2011

[94] This is the appeal of the Public Prosecutor against the acquittal and discharge of the second accused Mohd Diah at the close of the prosecution case without calling for his defence on a charge under s. 193 of the Penal Code.

[95] The learned Deputy Public Prosecutor has pleaded that the learned HMS had erred in law and in fact when he found that there was no evidence to prove that PW5 had in exh. P7 made a false statement in relation to the third charge. The learned Deputy Public Prosecutor submits that it was the second accused, Mohd Diah, who had caused PW5 to make a false statement.

[96] The court notes the finding of the learned HMS in relation to the third charge. In his grounds of judgment at p. 34 of the appeal records, the learned HMS had stated as follows:

> Jika diteliti kepada percakapan tersebut (this is a reference to exhibit P7), saya mendapati OKT 2 tidak berbohong dan jawapan beliau adalah konsisten dengan soalan yang dikemukakan kepada beliau. Beliau hanya menjawab soalan yang dikemukakan kepadanya. Apabila ditanya:
>
> S : Siapakah pegawai atau anggota yang terlibat di dalam soal siasat ke atas kedua-dua OKT tersebut?
>
> Selepas report tangkapan dibuat, tiada soal siasat dijalankan dan kedua-dua OKT tersebut telah dihantar ke lokap Balai Brickfield dan Balai Petaling.
>
> Adalah jelas dari keterangan yang dikemukakan bahawa selepas report tangkapan disediakan, sememangnya tidak lagi soalsiasat dibuat. Oleh yang demikian tidak ada perkara yang tidak benar di sini. SP13 pegawai perakam sepatutnya mengemukakan soalan yang lebih spesifik seperti yang dinyatakan dalam pertuduhan. Begitu juga tidak ditanya kepada SP5 siapakah yang mencederakan mangsa dengan menyiram air panas. SP5 juga tidak pernah ditanya samada mangsa dicederakan semasa soalsiasat. Oleh yang demikian saya mendapati tiada sebarang keterangan yang menunjukkan SP5 mengeluarkan kenyataan palsu.

[97] Quite apart from the above finding of the learned HMS, the court notes that the petition of appeal for Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-142-09-2011 as can be seen in pp. 7 and 8 of the appeal records is quite obviously wrong. Since the charge is only against Mohd Diah and none of the other accused persons, it follows therefrom that paras. 3.1, 3.3 and 2.5 are in error insofar as they refer to "tertuduh ketiga hingga ketujuh" or to the first and second charges. This is quite obviously a case where the learned Deputy Public Prosecutor had embarked on a "copy and paste" exercise without paying careful attention to the differences between the third charge as against

what was cut and pasted from the other charges. The upshot of this carelessness is that the court is faced with a petition of appeal which makes very little or no sense.

[98] In any event, the charge against the second accused under the s. 193 charge is that he had caused Constable Mohd Azuan to state that no interrogation was carried out on Prabakar and Solomon as well as not stating the truth that Prabakar and Solomon were hurt or injured as a result of being scalded with hot water. However, it must be observed that a charge under s. 193 of the Penal Code is one of intentionally giving false evidence. The court agrees with learned counsel for the respondent, Mohd Diah, that the charge as it stands is both bad and erroneous. The charge does not state that Mohd Diah had intentionally given false evidence. There is no known offence under s. 193 for causing some other person to give a false statement. On this ground alone, the appeal of the Public Prosecutor against the learned HMS's order of acquittal and discharge on the s. 193 charge must fail.

Conclusion

[99] In conclusion and for the reasons as aforestated, the court has dismissed the appeals of the appellants Mohd Shafie b. Abdul Halim and Mohd Diah b. Sulaiman in Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-152-10-2011 & Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-45-04-2012. Their convictions and sentences of four years imprisonment on each charge as imposed by the Sessions Court is herewith confirmed. Since the appellants have been on bail pending appeal, the court herewith orders that their sentences are to run concurrently with effect from today.

[100] In respect of the Public Prosecutor's appeal against the order of acquittal and discharge of the third to seventh accused persons (first to fifth respondents) in Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-141-09-2011 as well as the appeal against the order of acquittal and discharge of Mohd Diah bin Sulaiman on the s. 193 charge in Wilayah Persekutuan Rayuan Jenayah Bil. 42S(A)-142-09-2011, the court finds both appeals to be without merit. The court would dismiss both sets of appeals and affirm the order of acquittal and discharge at the close of the prosecution case without calling for the defence.